SUPREME COURT OF THE UNITED STATES.

No. ~~304~~. 42. 65.

JAMES O'BRIEN, PL'FF IN ER.,

vs.

RICHARD SMITH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

G. S. Gideon, Printer, 511 Ninth street, Washington.

SUPREME COURT OF THE UNITED STATES.

No. 304.

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United States of America.

The President of the United States to the judges of the circuit court of the District of Columbia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, wherein Richard Smith is plaintiff, and James O'Brien is defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your hand, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in said Supreme Court to be then and there held, and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right, and according to the laws and customs of the United States should be done.

Witness the Hon. Roger B. Taney, chief justice of said Supreme Court.

Issued this ninth day of November, 1859.

JNO. A. SMITH, *Clk.*

The United States of America to Richard Smith, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the District of Columbia for the county of Washington, wherein James O'Brien is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said James O'Brien in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Hon. James Dunlop, chief judge of the circuit court of the District of Columbia, this ninth day of November, 1859.

JAS. DUNLOP.

Service acknowledged.

CARLISLE & MAURY,
Att'ys for Richard Smith.

Copy appeal bond.

Know all men by these presents, that we, James O'Brien and Charles Werner, and William H. Ward, are held and firmly bound unto Richard Smith in the full and just sum of twenty-three hundred dollars, lawful money, to which payment well and truly to be made and done we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this seventh day of November, eighteen hundred and fifty-nine:

Whereas, at the present October term of the circuit court of the District of Columbia for the county of Washington, in a cause wherein the said James O'Brien was defendant, and the said Richard Smith was plaintiff, judgment was rendered against the said defendant, and he having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Richard Smith, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next:

Now, the condition of the above obligation is such, that if the said James O'Brien shall prosecute his writ with effect, and answer all damages and costs, if he fails to make his plea good, then the above obligation to be null and void, otherwise to be and remain in full force and virtue in law.

JAS. O'BRIEN, [SEAL.]
CHAS. WERNER, [SEAL.]
WM. H. WARD. [SEAL.]

Signed, sealed, and delivered in presence of—
ROSANNA O'BRIEN,
FRANK D. ORME.

Approved by the court, this 9th November, 1859.
True copy. Test: JNO. A. SMITH, *Clk.*

Style of court.

District of Columbia, to wit:

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the third Monday of October, being the seventeenth day of the same month, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-fourth. Present: James Dunlop, chief judge; the Honbls. James S. Morsell and Wm. M. Merrick, asst. judges; William Selden, Esq., marshal; John A. Smith, clerk.

In the record of the proceedings of said court, amongst others are the following, to wit:

Parties.

RICHARD SMITH
vs.
JAMES O'BRIEN.

Be it remembered, that heretofore, to wit, on the fourteenth day of October, in the year of our Lord one thousand eight hundred and fifty-eight, the said plaintiff, by Carlisle & Maury, Esqrs., his attorneys, prosecuted and sued forth out of the circuit court here, the United States writ of capias ad respondendum, directed to the marshal of the District of Columbia, in the words and of the tenor following, to wit:

Capias ad resp.

The United States of America to the marshal of the district of Columbia, greeting:

We command you, that you take James O'Brien, late of Washington county, if he shall be found within the county of Washington, in your said district, and him safely keep, so that you have his body before the circuit court of the District of Columbia, to be held for the county aforesaid, at the city of Washington, on the third Monday of October instant, to answer unto Richard Smith in a plea of trespass on the case, and so forth; hereof fail not at your peril, and have you then and there this writ.

Witness James Dunlop, Esq., chief justice of our said court, at the city of Washington, the 14 day of June, Anno Domini 1858.

Issued this 14th day of October, 1858.

JNO. A. SMITH, *Clk.*

And thereupon the said plaintiff, by his attorney aforesaid, on the day of prosecuting and suing forth of the aforesaid writ, declared against the said defendant in the plea aforesaid, in form following, to wit:

Nar.

District of Columbia, county of Washington, to wit:

James O'Brien, late of the county aforesaid, was attached to answer unto Richard Smith, cashier, in a plea of trespass on the case, and so forth; and thereupon the plaintiff, by Carlisle & Maury, his attorneys, complains: for that whereas the defendant, heretofore, to wit, on the 18th day of September, A. D. 1858, at Washington, to wit, the county aforesaid, according to the usage and practice of merchants, made his certain draft or order in writing, commonly called a check, on a banker, bearing date the day and year aforesaid, and then and there directed the said draft or order to certain persons, by the name and style of Chubb

Brothers & Company, and thereby then and there required the said Chubb Brothers & Company to pay to the Bank of Metropolis or bearer eleven hundred and fifty dollars; and the said bank afterwards, to wit, on the day and year aforesaid, at the county aforesaid, delivered the said draft or order to the plaintiff; and the plaintiff avers, that afterwards, to wit, on the day and year aforesaid, at the county aforesaid, he showed and presented the said draft or order to the said Chubb Brothers and Company, and then and there requested the said Chubb Brothers and Company to pay the said sum of money therein specified; but that the said Chubb Brothers and Company did not pay the same, or any part thereof, but wholly neglected and refused so to do: whereof the said defendant, on the day and year aforesaid, at the county aforesaid, had notice, by means whereof the said defendant became liable to pay the said sum of money in the said draft or order specified, and then and there undertook and faithfully promised to pay the same.

And whereas the defendant afterwards, to wit, on the twenty-first day of September, in the year eighteen hundred and fifty-eight, at the county aforesaid, was indebted unto the plaintiff in another sum of two thousand dollars, like money, for the like sum of money by the plaintiff to and for the use of the defendant before that time paid, laid out, and expended at the special instance and request of the defendant; and for other money by the plaintiff before that time lent and advanced to the defendant at his special instance and request; and for other money by the defendant before that time had and received to the use of the plaintiff; and being so indebted, the defendant, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, undertook and promised the plaintiff to pay him the last mentioned sum of money, when afterwards he should be thereunto required.

And whereas the defendant afterwards, that is to say, on the twenty-fifth day of September, in the year aforesaid, at the county aforesaid, accounted with the plaintiff of and concerning divers sums of money from the said defendant to the said plaintiff before that time due, owing, then in arrear and unpaid, and upon such accounting, the said defendant was then and there found in arrear and indebted to the said plaintiff in the further sum of three thousand dollars, like money, and being so found in arrear and indebted, the said defendant afterwards, that is to say, on the day and year last mentioned, at the county aforesaid, in consideration thereof, undertook, and then and there faithfully promised to pay to the plaintiff when thereto afterwards required, the said last mentioned sum of money.

Yet the defendant, the said several sums of money, herein mentioned, or any part thereof, (although often thereto requested, to wit, on the day and year last aforesaid, at the county aforesaid,

and often afterwards,) has not paid, but the same or any part thereof to pay has hitherto wholly refused, and still does refuse, to the damage of the plaintiff in the sum of four thousand dollars current money; and therefore he brings suit and so forth.

CARLISLE & MAURY,
Attorneys for the Plaintiff.

October term, 1858. *Marshal's return.*

At which mentioned third Monday of October, in the year eighteen hundred and fifty-eight, and the day of the return of the aforegoing writ, comes again into the circuit court here, the said plaintiff, by his attorneys aforesaid, and the marshal of the District of Columbia, to whom the said writ was in form aforesaid directed, makes return thereof to the court here, thus endorsed, to wit:

"Cepi" & JNO. F. ENNIS.
W. SELDEN, *Marshal.*

Defts. appearce. Rule plea. Non assumpsit. Issue joined. Venire facias.

Whereupon, the said defendant being called, appears in court here by John F. Ennis, Esq., his attorney; thereupon, on motion of the said plaintiff, by his attorneys aforesaid, it is ruled by the court here, that the said defendant answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, or judgment by the court here will be entered against him in default thereof; thereupon the said defendant, by his attorney aforesaid, defends the wrong and injury, when and so forth, and says that he did not assume upon himself in manner and form as the aforesaid plaintiff above against him hath declared, and of this he puts himself upon the county, and the said plaintiff in like manner, and so forth; therefore, let a jury thereon appear before the court here on the third Monday of January next, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., the same day is given to the said parties then and there, and so forth.

Jan'y term, 1859.

At which mentioned third Monday of January, in the year of our Lord eighteen hundred and fifty-nine, come again into the circuit court here as well the said plaintiff, by his attorneys aforesaid, as the said defendant, by his attorney aforesaid; thereupon, further process of an upon the premises aforesaid between the parties aforesaid, by consent of the said parties, by their attorneys aforesaid, and by order of the court here thereon, the said cause is continued until the first Monday of May next.

May term, 1859.

At which mentioned first Monday of May, in the year eighteen

hundred and fifty-nine, come again into the circuit court here, as well the said plaintiff, by his attorneys aforesaid, as the said defendant, by his attorney aforesaid; thereupon, further process on and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, by their attorneys aforesaid, and by order of the court here thereon, the said cause is further continued until the third Monday of October next.

October term, 1859. *Jury. Verdict for plff. Damages. Judgment. Costs.*

And now at this day, to wit, the said third Monday of October, in the year of our Lord one thousand eight hundred and fifty-nine, come again into the circuit court here as well the said plaintiff, by his attorneys aforesaid, as the said defendant, by his attorney aforesaid; whereupon, for trying the issue aforesaid, it is ruled by the court here that twelve persons from the panel of petit jurors returned to the court here by the marshal of the District of Columbia, be called, who, being called, come, to wit: 1. Alfred Ray; 2. James McColgan; 3. Adam Gaddis, Jr.; 4. Eustice E. O'Brien; 5. Thomas Galligan; 6. Bennett Henning; 7. Samuel E. Douglass; 8. James L. Barbour, 9. Comfort S. Whittlesey; 10. Thomas E. Young; 11. Thomas Fitnem; 12. George F. Dyer, who, being duly empannelled and sworn to say the truth of and upon the premises aforesaid, upon their oath do say, that the said defendant did assume upon himself in manner and form as the aforesaid plaintiff above against him hath declared, and they assess the damages of the said plaintiff sustained by reason of the non-performance of the promise and assumption aforesaid of the said defendant to the sum of eleven hundred and fifty dollars, current money, with interest from 18th September, 1858, and one dollar and seventy-five cents costs of protest. Therefore, it is considered by the court here, that the said plaintiff recover against the said defendant as well the sum of eleven hundred and fifty dollars, current money, with interest from the 18th September, 1858, and one dollar and seventy-five cents, cost of protest, by the jurors aforesaid, in form aforesaid assessed, for his damages which he had sustained by reason of the non-performance of the promise and assumption aforesaid, as the sum of thirty-seven dollars and thirteen cents by the court here unto him the said plaintiff or his assent adjudged for his costs and charges by him about his suit in this behalf laid out and expended; and the said defendant in mercy, &c.

Test: JNO. A. SMITH, *Clk.*

Memorandum.

Before the jurors aforesaid retired from the bar of the court here, the said defendant, by his attorney aforesaid, filed in court here the following bills of exceptions and statement of evidence, to wit:

Defts. statement of evidence.

RICHARD SMITH
vs.
JAMES O'BRIEN. } Defts. statement of evidence.

And thereupon, the defendant offered evidence to prove, that on the 18th of September, 1858, before half-past one o'clock p. m., he took up a certain acceptance due at the Bank of the Metropolis, of which the plaintiff is cashier, by paying part thereof in cash, and for the balance giving to the teller of said bank the check sued on; that he then had to his credit in the hands of the drawees the sum of twelve hundred and sixty dollars, ($1,260,) being more than sufficient to meet said check; that said Bank of the Metropolis retained said check without presentment until Monday, the 20th of said month, when it was presented for payment by their agent at about eleven o'clock a. m., and payment refused, the drawees having then stopped payment; that the drawees payed all demands upon them during Saturday, and on Monday morning until about the hour of eleven o'clock, when they stopped payment; that said check, if presented on the day it was received by the bank, would have been paid, and might have been paid if presented earlier Monday morning; that the place of business of the Bank of the Metropolis is situated on 15th street west, in the city of Washington, distant from the place of business of the drawees, in the same street, about eighty feet; that the defendant was not a customer of the Bank of the Metropolis, and kept no account there; that for the purpose of collecting checks in the District the said bank employed at the time when said check was passed to them, and subsequently, two runners, one for collections in the upper portion of said city, including the place of business of the drawees and Georgetown, and the other for the lower portion of said city; that the runner first mentioned was in the habit of leaving the bank to make his collections shortly after nine o'clock a. m., when the bank opened; that he would generally make said collections early in the morning, and be in readiness, subject to the orders of the bank, from about one o'clock until the close of the bank; that when checks on the drawees were paid in at said bank, they were sometimes presented for payment on the day delivered, though generally held over until the day following; and further proved by John G. Clarke, employed in the house of Riggs & Co., that said house seldom sent checks to the banks in the lower part of the city more than once a day, but sent them to the banks in the neighborhood twice a day; that checks on banks in the neighborhood (and among them the drawees) were sent out in the morning between ten and eleven o'clock, and again in the afternoon about two o'clock; that had the check sued on been paid in at Riggs & Co.'s, it would have been sent over on the day it was received, and that there are not

two days in the week when Riggs & Co. do not send out checks on banks in the neighborhood twice a day; and further proved on cross-examination of Thomas Jewell, one of plaintiff's witnesses in the Bank of the Metropolis, that he saw the runners of Riggs & Co. and of Lewis Johnson & Co. at the counter of the Bank of the Metropolis two or three times a day, and had no doubt it was to present checks for payment; and further proved that the check sued on continued to be the property of the Bank of the Metropolis until the bringing of this suit; and the said witness, Clarke, on cross examination by the plaintiff, testified that he was teller for Riggs & Co., and has been for five years, and was runner for Corcoran & Riggs for eight years; that the usage was always to send but once a day to other banks, whether in the neighborhood or not, until some years ago. Since he has been teller for Riggs & Co., finding it more convenient to count the coin or notes than to make up schedules of the checks, he began to send the runner over to the Bank of the Metropolis and to the Treasury and to Chubb Bros. (all being in the immediate neighborhood) twice a day; that he communicated this practice to Mr. Riggs, who approved of it, and that he has always conformed to it since; that the general rule is to send but once a day; that to the banks down town he seldom sent more than once a day.

And the evidence being closed, the plaintiff prayed the court to instruct the jury as follows:

Defts. 1st bill of exceptions.

If the jury believe from the evidence aforesaid that the said check was made by the defendant, and was received from him at the counter of the said bank in payment of the defendant's acceptance as aforesaid, held by the said bank on Saturday, the 18th of September, 1858, after one o'clock p. m., and after the checks on other banks received there on the day previous, and in the earlier part of the said 18th of September, had been sent out for presentation at the banks upon which they were respectively drawn; and that the usage of the said Bank of the Metropolis, and the general usage of the banks in the city of Washington, then was and had been to send out such checks for presentation once a day, and to present on the next day all checks received after that time; and that the said check of the defendant was presented at the counter of Chubb Brothers on Monday morning, the 20th September, 1858, about the usual hour for such presentation, and that the said Chubb Brothers refused payment thereof, and that the said check was on the same day, and about 3 o'clock, presented, and payment demanded at the said counter, and payment refused, and that the said check was on the same day protested for non-payment thereof, and notice of such non-payment given to the defendant on the same day by leaving such notice at his place of abode, then the plaintiff is entitled to recover in this

action; which instruction the court gave, and to the giving thereof the defendant objected and excepts, and prays the court to sign and seal, and cause to be enrolled this his first bill of exceptions, which is accordingly done, this 29th of October, A. D. 1859.

JAMES DUNLOP, [SEAL.]
JAS. S. MORSELL, [SEAL.]
WM. M. MERRICK. [SEAL.]

Defts. 2nd bill of exceptions.

That if the jury believe from the evidence aforesaid that the said check was made by the defendant and by him paid in at the plaintiff's bank on account of his acceptance there due, on Saturday, the 18th September, 1858, in the afternoon, and that the same was presented at the banking-house of the said Chubb Brothers, on the morning of Monday, the 20th September, 1858, and payment then and there demanded, then such presentment and demand were made in reasonable time; and if the payment of the said check was refused, and notice thereof given to the defendant on the same day, the defendant is liable on the said check in this action; which instruction the court gave, and to the giving thereof the defendant objected, and now excepts, and prays the court to sign and seal and cause to be enrolled this his 2nd bill of exceptions, which is accordingly done this 29th of October, 1859.

JAMES DUNLOP, [SEAL.]
JAMES S. MORSELL, [SEAL.]
WM. M. MERRICK. [SEAL.]

And thereupon, the defendant prayed the court to instruct the jury as follows:

Defts. 3d bill of exceptions.

1. That upon the whole evidence aforesaid, if the jury shall believe the same, the plaintiff is not entitled to recover in this action.

2. That if the jury shall find upon the whole evidence aforesaid that the check sued on was, when this suit was brought, the property of the said Bank of the Metropolis, and held by the plaintiff as their agent, without any beneficial interest therein, then the plaintiff is not entitled to recover in this action.

3. That if the jury shall find upon the whole evidence aforesaid that the defendant delivered the check sued on to the Bank of the Metropolis before half-past 1 o'clock p. m. on Saturday, the 18th September, 1858, in payment of his acceptance; that said Bank of the Metropolis being the holder and owner of said check until its dishonor, failed to use reasonable diligence in the presentment of the same for payment, and might, had reasonable diligence been used, have conveniently presented the same for payment on the day it was received, and that if so presented said

check would have been paid with funds belonging to the defendant in the possession of said drawees, and subject to said check, and that in consequence of the failure to present said check in reasonable time, the same was dishonored when presented, then the plaintiff is not entitled to recover in this action.

4. That if the jury shall find from the whole evidence aforesaid that the said check was delivered by the defendant to the Bank of the Metropolis on Saturday, the 18th of September, 1858, a few minutes after 1 o'clock p. m., in part payment of his acceptance which matured on said day at said bank, and that said check was held over by said bank during the residue of Saturday and the day following, and was not presented for payment by said bank until Monday, the 20th of said month, after the drawees stopped payment, and that until the dishonor of said check, the said bank was the holder and owner thereof, then the said bank did not use reasonable diligence in the presentment of said check, and plaintiff is not entitled to recover in this action; if the jury shall believe further that the defendant had funds in the hands of the drawees subject to said check, and that the same would have been paid if presented on Saturday.

Which instructions and each of them the court refused to give to the jury, and to such refusal the defendant excepts, and prays the court to sign, seal, and cause to be enrolled this his 3d bill of exceptions, which is accordingly done this 29th of October, 1859.

JAS. DUNLOP, [SEAL.]
JAS. S. MORSELL, [SEAL.]
WM. M. MERRICK. [SEAL.]

Plaintiff's statement of evidence.

On the trial of this cause the plaintiff gave evidence tending to show—

That the defendant, on Saturday, the 18th day of September, 1858, having an acceptance theretofore made by him, due on that day at the Bank of the Metropolis, came to the said bank between one and two o'clock p. m., and there took up the said acceptance, paying a certain sum in money, and giving for the balance the check described in the nar, which check was then and there made by him and delivered to the plaintiff, who is the cashier of the said bank, and the holder of the said check for the use of the said bank; that some hours before the said check was so received, the runners of the bank had gone out upon their daily tour with checks, &c., on other banks in the city of Washington to make their daily exchanges or settlements; that it is the usage of all the banks in the said city to send out but once a day the checks upon the banks received up to the time of so sending, and that this usage has prevailed for upwards of twenty years, and that the same is founded upon a due regard to the necessary convenience of the banking business; and that it is, and during the time

aforesaid has been the usage, to present on the next day (or if the next day was Sunday, then on the succeeding Monday) all checks on the other banks received after the regular sending out of the checks for the day as above mentioned; that on Monday, the 20th September, 1858, at the usual hour, to wit, about eleven o'clock a. m., the said check was in the usual course of business presented by the runner of the said Bank of the Metropolis at the counter of the banking-house of said Chubb Brothers, who are bankers in the city of Washington, and payment demanded, and that payment was then and there refused; and that thereafter, on the same day, the said check was duly protested for non-payment, and notice of its dishonor was on the same day given to the defendant, by leaving notice, in the usual form, at his place of abode in said city; that the said defendant, although he kept no account at the plaintiff's bank, had acceptances and notes frequently falling due there, and had paid them in like manner.

Test: JNO. A. SMITH, *Clk.*

Writ of error produced.

And whereas, afterwards, to wit, on the ninth day of November, one thousand eight hundred and fifty-nine, the said defendant, by his attorney aforesaid, produced and filed in court here the United States writ for the correction of errors of an upon the judgment aforesaid, directed to the judges of the circuit court of the District of Columbia, sitting for the county of Washington; and in pursuance thereof, and according to the form and effect of the law in such case made and provided, a transcript of the proceedings of the record of the judgment aforesaid, and all things thereunto relating, with the writ of error aforesaid, and a copy of the appeal bond hereunto annexed, is hereby transmitted to the said Supreme Court accordingly.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, this 17th day of November, 1859.

[L. S.]

JNO. A. SMITH, *Clk.*

JAMES O'BRIEN, vs. RICHARD SMITH. } *In error to the Circuit Court of the United States for the District of Columbia.*

BRIEF OF PLAINTIFF IN ERROR.

The Bank of the Metropolis is an unincorporated and unlegalized commercial partnership, transacting business as a Bank of discount and deposit. The check which is the cause of action was given by the plaintiff in error for part of the amount of a draft accepted by him and held by said Bank. There are no incorporated banks in the District of Columbia; the charters of all of them having expired long before the institution of this suit. Act of 1841, ch. 12, (5 Stat. at L., 449;) act of 1844, ch. 98, (Id., 677.)

On the part of the plaintiff in error it will be contended—

I. That reasonable diligence was not used in presenting the check and demanding payment.

The check was received before half-past one o'clock on Saturday, and was not presented until about eleven o'clock on the following Monday, on which day the drawees stopped payment. Their place of business was distant only about eighty feet from the Bank of the Metropolis. The usage is, for banks to send out checks on other banks in the neighborhood twice a day. (R., 7, 8.)

Where no time is specified for the payment of a check or bill of exchange, it is payable on demand. Admitting that, in the case of the check in controversy here, the demand might have been made on the day after it was received, if that day had not been Sunday; the custom of merchants required the

demand to be made on the preceding Saturday. That this custom is applicable to all bank transactions, and is extended, by analogy, to the execution of all contracts. See Kilgour *vs.* Miles & Goldsmith, 6 Gill & John., 274.

II. The defendant in error has no right of action against the plaintiff in error.

The defendant in error claims as cashier of the Bank of the Metropolis, (R., 10,) and so describes himself in the declaration. (R., 3.) It was proved on the trial below that the check sued on continued to be the property of the Bank of the Metropolis until the institution of the suit. (R., 8.)

As above stated, the Bank of the Metropolis has no legal existence as a chartered institution, but is a mere partnership, and the suit is brought by an officer of this partnership, whose possession of the paper, the only evidence of title, was confessedly the possession of the partnership.

This is not the case of a party having a legal title to the paper in his individual right, evidenced by possession of the paper sued on; but, on the contrary, paper belonging to a partnership and held for its benefit by one of its officers. There was here no special endorsement to the defendant in error and no other evidence of title than mere possession, and that possession was of an *official* not an *individual* character. No evidence was offered as to the extent of the authority of defendant in error as cashier of the Bank, or whether he was entitled to bring suit or only to the mere custody of the paper. The testimony of Smith was deemed essential to show that the Bank well knew the condition of Chubb Bros., and, in order to bolster them up, failed to present the check; but he could not be examined as a witness, being a party to the record. In the second instruction prayed for by plaintiff in error, the court was asked to instruct the jury that, if they should find that the check sued on was, when the suit was brought, the property of the Bank of the Metropolis, and held by the plaintiff as their

agent, without any beneficial interest therein, then the plaintiff was not entitled to recover in this action. (R., 9.)

Where a check is taken for part of the amount of a note held by a Bank, and there is no evidence that the check has been transferred to the cashier, or that the suit was instituted in his name by direction of the Bank, there can be no recovery in a suit so instituted on the check. The cashier may have the *custody*, while the legal possession remains in the Bank. Olcott *vs.* Rathbone, 5 Wend., 490. An agent or depositary cannot sustain an action upon a check payable to bearer. Sherwood *vs.* Roys, 14 Pick., 172. There was no evidence that the check had been transferred to the defendant in error. It nowhere appears who are the persons composing the firm of the "Bank of the Metropolis;" nor what their private arrangements with their cashier may have been; nor that the plaintiff in error had notice of the same.

DAVIDGE & INGLE,
For Plaintiff in Error.

SCAMMELL & CO., Printers,
Cor. 3d & Indiana avenue, third floor.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1861.

RICHARD SMITH, defendant in error,
ads.
JAMES O'BRIEN.
} No. 65.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

Brief for Defendant in Error.

Richard Smith, who, as appears by the record, (p. 7 and p. 10,) was cashier of the Bank of the Metropolis, brought *assumpsit* against O'Brien upon a bank check, for $1,150, drawn by O'Brien upon Chubb Brothers & Co., and passed by him to the Bank of the Metropolis in payment of a note of his (O'Brien's) due at that bank on the day of the date of the check.

The verdict was for the plaintiff; and to reverse the judgment thereon this writ of error was brought.

The statement of the plaintiff's evidence (at pp. 10 *et seq.* of the record,) presents the whole matter briefly, and, for convenience, is here transcribed.

Plaintiff's statement of evidence.

On the trial of this cause the plaintiff gave evidence tending to show—

That the defendant, on Saturday, the 18th day of September, 1858, having an acceptance theretofore made by him, due on that day at the Bank of the Metropolis, came to the said bank between one and two o'clock p. m., and there took up the said acceptance, paying a certain sum in money, and giving for the balance the check described in the *nar.*, which check was then and there made by him and delivered to the plaintiff, *who is the cashier of the said bank, and the holder of the said check for the use of the said bank;* that *some hours before the said check was so received, the runners*

(Chubb Bro.' having failed)

of the bank had gone out upon their daily tour with checks, &c., on other banks in the city of Washington to make their daily exchanges or settlements; that *it is the usage of all the banks in the said city to send out but once a day the checks upon the banks received up to the time of so sending, and that this usage has prevailed for upwards of twenty years, and that the same is founded upon a due regard to the necessary convenience of the banking business; and that it is, and during the time aforesaid has been the usage, to present on the next day (or if the next day was Sunday, then on the succeeding Monday) all checks on the other banks received after the regular sending out of the checks for the day as above mentioned; that on Monday, the 20th September, 1858, at the usual hour, to wit, about eleven o'clock a. m, the said check was in the usual course of business presented by the runner of the said Bank of the Metropolis at the counter of the banking-house of said Chubb Brothers, who are bankers in the city of Washington, and payment demanded, and that payment was then and there refused; and that thereafter, on the same day, the said check was duly protested for non-payment, and notice of its dishonor was on the same day given to the defendant, by leaving notice, in the usual form, at his place of abode in said city; that the said defendant, although he kept no account at the plaintiff's bank, had acceptances and notes frequently falling due there, and had paid them in like manner.*

Upon this state of facts no instructions were given to the jury at the prayer of the plaintiff.

But the defendant (O'Brien) prayed certain instructions, which will be found at pp. 8, 9, and 10 of the record, and which were all refused. The case comes here upon exceptions to the refusal of the court to give these instructions.

Two questions are made upon these exceptions:

I. As to the refusal to instruct the jury to the effect that the failure to present the check received on Saturday afternoon, (*after the daily clearing by the usage of the banks,*) until Monday, at eleven o'clock, made the check an absolute payment to the plaintiff below.

This is clearly settled, on principle and authorities, to the contrary.

As to O'Brien, it could only be regarded as *a conditional payment;* that is, if, upon presentment in a *reasonable time*, the check should be paid. And the presentment on Monday morning *was*

in reasonable time. For this it is hardly necessary to refer to authorities. It is so laid down in the text books.

Story on Bills, § 419.
Grant on Banking, 50 and 209.

and cases cited.

II. The question whether the plaintiff, being the cashier of the Bank of the Metropolis, and "*the holder of the check for the use of the said bank*," (*Rec. p.* 10,) could maintain the action.

As to this, it may be sufficient to refer to the case of Law *vs.* Parnell, 7 J. Scott, N. S., 282, which is this very case; and, by all the Justices, "the bank might lawfully constitute any third person the holder of the bill, for the purpose of suing upon it."

Upon the whole, it is submitted that the case appears to have been brought here for delay only; and that the judgment should be affirmed with damages.

J. M. CARLISLE,
Of Counsel for Defendant in Error.